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82-124
No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ANTHONY CHARLES ROSSANO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTIONS PRESENTED

1. Whether the requirement of 18 U.S.C. §1955(b)(1)(ii) that at least five persons "conduct, finance, manage, supervise, direct or own" an illegal gambling business includes persons whose activities are purely ancillary in nature and do not entail actual involvement in the gambling operation itself.

2. Whether the Government failed to prove the existence of the enterprise charged in the indictment, and that its affairs were conducted through a pattern of racketeering activity.

3. Whether the Government failed to present sufficient evidence to prove that the enterprise charged in the indictment affected interstate commerce as required by 18 U.S.C. §1962(c).

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

A copy of the Judgment and Commitment Order of the United States District Court for the Eastern District of Pennsylvania dated June 17, 1981 is contained in Appendix A. A copy of the Judgment Order of the United States Court of Appeals for the Third Circuit dated May 14, 1982, affirming Petitioner's conviction is contained in Appendix B. A copy of the denial of Petitioner's petition for rehearing by the United States Court of Appeals for the Third Circuit dated June 15, 1982 is contained in Appendix C. These Judgment Orders are as yet unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered and dated May 14, 1982. A timely petition for rehearing *en banc* was denied by an order dated June 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The United States Code, Pub. L. 91-452, Tit. VIII §803(a), October 15, 1970, 84 Stat. 937, *18 U.S.C. §1955* provides, in pertinent part:

> §1955 Prohibition of Illegal Gambling Businesses
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section —
>
> (1) "illegal gambling business" means a gambling business which —
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business.

United States Code, Pub. L. 91-452, Tit. IX §901(a), October 15, 1970, 84 Stat. 942, *18 U.S.C. §1962(c)* provides:

> §1962 Prohibited Activities
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indi-

rectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

This is a petition for certiorari arising from the following facts. On April 28, 1981, Petitioner was found guilty in the United States District Court for the Eastern District of Pennsylvania, after a trial by jury, of violating 18 U.S.C. §§1962(c), 1955, 371 and 2. These statutes proscribe the conducting of an enterprise through a pattern of racketeering activity, operation of an illegal gambling business, conspiracy, and aiding and abetting, respectively. The basis for federal jurisdiction of the District Court was 28 U.S.C. §1291.

Petitioner was sentenced on June 17, 1981. The District Court imposed concurrent two year terms of imprisonment for Counts One (1) and Three (3) and a $10,000 fine. On Count Two (2), the Court suspended sentence and placed Petitioner on probation for a period of one month, to run concurrent with the two year prison term. Imposition of the sentence was stayed pending appeal to the United States Court of Appeals for the Third Circuit.

On May 14, 1982, the Court of Appeals entered a judgment affirming Petitioner's convictions. Petitioner's motion for a rehearing *en banc* was denied on June 15, 1982. Petitioner filed a motion to stay issuance of the court's mandate pending application to this Court for writ of certiorari on June 18, 1982. The court below granted the motion on June 30, 1982 and entered an order staying the mandate to July 22, 1982.

The facts of this case are not complicated. Jack Woodman and James Stinsman were police officers working in a special unit of the Philadelphia Police Department that investigated illegal gambling. As part of their job, Woodman and Stinsman cultivated for themselves a reputation as corrupt officers in order to approach Petitioner's co-defendant and obtain payments

for protecting a card game in South Philadelphia. (T4-10).[1]

On July 21, 1978, the officers met with Joseph Lerro in Lerro's jewelry store. At that time, Lerro told Woodman that Petitioner's co-defendant, Frank Narducci, wanted to "do business" with Woodman. (T1-46-47). Woodman reported this conversation to his commanding officer and the FBI and an investigation was commenced.

For the next three months, Officer Woodman made numerous unsuccessful attempts through Lerro to meet Narducci. On November 2, 1978, the first short meeting took place, at which Narducci rebuffed Woodman's attempts to "do business". (Govt. Exhibit 6R-1). Thereafter, other unsuccessful attempts were made to engage in a recorded conversation with Narducci.

The officers were long aware that the card game in question usually was played at two locations, that is, 1153 South 8th Street, and 1214 South 7th Street, in South Philadelphia. However, in early March of 1979, their surveillance revealed for the first time that the card game was being played at a new location, that is, 803 Latona Street in South Philadelphia.

On March 27, 1979, Officers Woodman and Stinsman saw numerous persons enter and exit 803 Latona Street. The officers went into the house and found numerous men gathered around the dining room table, which was strewn with cards and money. Someone shouted "fuzz", and panic errupted. Thereafter, Petitioner and the two officers left the premises to speak outside. (T2-42-43). Petitioner and the officers agreed that the officers would accept $500 for protection of the card game. This payment would occur at Petitioner's place of employment, Floorkrafters Furniture Store, on the next day. From that point on, arrangements were made to pay

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1. T refers to the transcripts of trial. It is followed by the day and page number.

the officers $400 per month in return for allowing the ziginette card game to continue. (Govt. Exhibit 7R-1). The meetings between Petitioner and the officers or several other individuals and the officers, continued until June 23, 1980, at which time the FBI again raided the card game, this time at 1214 South 7th Street. (T3-67). A three count indictment was returned on July 14, 1980 and trial commenced on April 21, 1981.

During trial, the Government attempted to prove as part of its case that at least five persons had "conducted" the ziginette card game as required by 18 U.S.C. §1955-(b)(1)(ii). In addition to Petitioner and co-defendant Narducci, the Government included the following individuals: Angelo Angelucci and Alfred Mazzucca, were alleged doormen. (T3-3, 4-65). John Palumbo and Joseph Pinto, alleged cooks, were observed wearing aprons and preparing food. (T4-66, 4-133-134). Danny Rossano, Petitioner's seventeen year old son, alleged errand boy, was seen going to the corner store and returning with hoagie bags. (T4-152, 153). Joseph Dupoldit, was an alleged trash collector. (T3-58, 59). Adeline Narducci, Susan Narducci, and Marie Baccari, were owners of the premises in which the card games were carried on. (T4-216-218).

Petitioner was convicted on all counts leading ultimately to this petition.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS CONCERNING AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioner respectfully contends that his conviction under 18 U.S.C. §1955, affirmed by the Court of Ap-

peals, is in conflict with the law as expressed in other circuits and that there is a split among the circuits concerning the types of persons to be counted toward the five person requirement of 18 U.S.C. §1955(b)(1)(ii).

An essential element of 18 U.S.C. §1955 is that five or more persons "conduct, finance, manage, supervise, direct or own" an illegal gambling business. 18 U.S.C. §1955(b)(1)(ii).

This Court has defined the term "conduct" as "any degree of participation in an alleged gambling business, except participation as a mere bettor." *Sanabria v. United States*, 437 U.S. 54, 70-71, n. 26 (1978). It includes both the street level employees and management level personnel. H.R. Rep. No. 91-1549, 91st Cong. 2d Sess. (1970); 2 U.S. Code Cong. & Adm. News (1970) at p. 4029. While this definition seems clear on its face, there is substantial confusion among the circuits as to its scope.

The Fifth, Seventh, and Eighth Circuits have ruled that *any* activity, other than mere betting, which is *either* "necessary or helpful" to the gambling operation will be sufficient to include the participants in the five person requirement. *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Tucker*, 638 F.2d 1292 (5th Cir.), *cert. denied*, 102 S.Ct. 132 (1981); *United States v. Colacurcio*, 659 F.2d 684 (5th Cir. 1981); *United States v. Bennett*, 563 F.2d 879 (8th Cir.), *cert. denied*, 434 U.S. 924 (1977); *United States v. Reeder*, 614 F.2d 1179 (8th Cir. 1980).

Thus, in *United States v. Tucker, supra*, the Fifth Circuit held that waitresses who served drinks to gamblers, made change for them and delivered telephone messages could be counted toward the five person requirement. In so ruling, the court stated that the test for inclusion was not whether such persons performed a "necessary function" to the gambling operation, but merely whether their participation was "helpful". *Id.* at

1295-96. *Colacurcio*, *Bennett*, and *Reeder*, *supra*, have ruled likewise under similar factual situations.

On the other hand, the Tenth Circuit has recently held in *United States v. Boss*, 671 F.2d 396 (10th Cir. 1982), that while §1955(b)(1)(ii) participants may include both street and management level personnel, those persons must have a function at their level which is necessary to the gambling business and not merely helpful to it. Thus, waitresses who did nothing more than serve drinks to gamblers in the back room of a club could not be counted toward the §1955 five person requirement since such conduct, while helpful, was not a necessary function of the gambling operation. *See also*, *United States v. Morris*, 612 F.2d 483 (10th Cir. 1979); *United States v. Smaldone*, 583 F.2d 1129 (10th Cir.), *cert. denied*, 439 U.S. 1073 (1979).

This is not to say that participation must be literally necessary to the existence of the gambling business. Rather, "necessary function" as defined in *Boss* means that an individual's activity, at whatever its level, must entail some sort of actual involvement in the gambling operation itself. *United States v. Boss*, *supra*, 671 F.2d at 400. Applying this standard to the case before it, the court found that the job of serving drinks to gamblers, without more, was purely ancillary to the operation of the illegal dice game and thus, insufficient for purposes of §1955(b)(1)(ii). The waitresses therefore could not be counted towards the statutory requirement.

The court managed to reconcile its holding, at least in part, with *Tucker* and its progeny by noting that the waitresses in those cases not only served drinks, but also delivered messages, made change for players, and acted as security guards or lookout persons. *United States v. Boss*, *supra*, 671 F.2d at 400, fn. 5. *See*, *United States v. Bennett*, 563 F.2d 879, 883 (8th Cir.), *cert. denied*, 434 U.S. 924 (1977); *United States v. Colacurcio*, 659 F.2d 684, 686 (5th Cir. 1981). At the same time, however, the Tenth Circuit made it quite clear that it disagreed with

these cases to the extent that they had interpreted §1955 to include persons whose activities were merely helpful to an illegal gambling business. *United States v. Boss*, *supra*, 671 F.2d at 400.

The court also distinguished this Court's "any degree of participation" language in *Sanabria v. United States*, 437 U.S. 54, 70-71, n. 26 (1978), by noting that *Sanabria* and all of the cases cited therein, involved prosecutions of distinct bookmaking operations where the task was to determine whether there was a connection between them sufficient to consider them as one under §1955. Furthermore, in *Sanabria* and all the cases cited by it, the gambling operations involved some "actual gambling function necessary to the illegal operation". *United States v. Boss*, *supra*, 671 F.2d at 399. The Tenth Circuit is therefore implying either that the *Sanabria* language does not apply to the factual pattern set in *Boss*, or that the facts in *Sanabria* and the cases cited therein show that this Court's language was not meant to be taken at fact value.

The *Boss* and *Tucker* cases discussed above, demonstrate that there is a split in the circuits concerning what type of activity constitutes "conduct" under §1955(b)(1)(ii) and what standard is to be applied in making that determination. While the Third Circuit has stated generally that all participants except bettors are covered by the statute, *United States v. Riehl*, 460 F.2d 454, 459 (3d Cir. 1972), it has not voiced its opinion on the standard to be applied in a factual setting similar to that of *Boss* and *Tucker*.

Petitioner respectfully submits that the resolution of these conflicts should be made in favor of the reasoning and conclusions set out by the Tenth Circuit in *Boss* for a number of reasons.

First of all, the "necessary function" test as defined by the Tenth Circuit in *Boss* comports with both the statutory language and legislative history of the statute. As stated by the court in *Boss*:

> "The 'conduct, finance' etc. terms of the statute focus on some actual involvement in the gambling operation as our *Smaldone* and *Morris* opinions illustrate. We are convinced that the interpretation conforms to the clear terms of the statute as well as the legislative history of §1955. For although the statute contemplated 'high level bosses and street level employees', it was intended 'to reach only those persons *who prey systematically* upon our citizens and *whose syndicated operations are so continuous and so substantial* as to be of national concern . . .' H. Rep. No. 91-1549, 91st Cong., reprinted in [1970] U.S. Code Cong. & Adm. News 4077 at 4029 (Emphasis added)." *United States v. Boss* 671 F.2d 396, 400 (10th Cir. 1982).

A plethora of cases demonstrate that as a matter of fact, individuals who have been held to "conduct" within the meaning of §1955 engaged in precisely those kinds of activities which are considered "necessary functions" under the *Boss* definition. Thus, dealers, doormen, bouncers, security guards, message runners, linemen, telephone clerks, and collection agents all play roles which are integral functions of the gambling operation. *See* e.g., *United States v. Tarter*, 522 F.2d 520 (6th Cir. 1975); *United States v. Boyd*, 566 F.2d 929 (5th Cir. 1978); *United States v. Bourg*, 598 F.2d 445 (5th Cir. 1979); *United States v. Graham*, 534 F.2d 1357 (9th Cir. 1976); *United States v. Hunter*, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973); *United States v. Manson*, 494 F.2d 804 (7th Cir.), *cert. denied*, 419 U.S. 994 (1974).

In no case has a purely ancillary activity which is merely helpful or convenient been held sufficient to amount to "conduct". As mentioned previously, even those cases which purport to reject the necessary function test have presented facts which were sufficient to meet that test. *United States v. Tucker*, 638 F.2d 1292

(5th Cir.), *cert. denied*, 102 S.Ct. 132 (1981) (waitresses also acted as messengers and change makers for bettors); *United States v. Bennett*, 563 F.2d 879 (8th Cir.), *cert. denied*, 434 U.S. 924 (1977) (waitresses conducted bettors in and out of premises); *United States v. Colacurcio*, 659 F.2d 684 (5th Cir. 1981) (waitresses functioned as security guards).

Finally, it must be recognized that while the legislature intended the scope of §1955 to be broad, it did have a limit in mind. To extend the statute to include the countless activities which are merely helpful to a gambling business would elevate even the most trivial conduct to a federal level:

> "To extend the statute further so as to treat as 'conductors' all those involved in some activity merely helpful to a gambling business would federalize prosecution of a host of activities beyond the legislative intent. Moreover, to hold that waitresses in the circumstances of this case could be conductors would mean, of course, that they are subject to conviction of the federal crime (though they need not be charged or convicted to be counted). We are convinced such an interpretation is beyond the intended reach of the statute." *United States v. Boss*, at 400-401.

Even the *Tucker* court realized that to apply a "necessary *or* helpful" test to participants would create serious problems, but declined to define the limits of such a standard. *United States v. Tucker*, 638 F.2d 1292, 1296, n. 8 (5th Cir. 1981).

Applying the standards set out in *Boss* to the present case, it is clear that the Government failed to prove that five persons "conducted" the gambling business as required by §1955.

Assuming that Petitioner, co-defendant Narducci, and the two doormen can be counted as conductors of the business under the necessary function test, none of

the other alleged participants satisfy the test. The cooks, errand boy, and trash collector in this case are no different than the waitresses in *Boss*. None of these individuals engaged in any activity which could be viewed as part of the gambling operation. While their services might have been helpful or convenient, they were purely ancillary to the business and did not amount to "necessary functions".

Likewise, there was no evidence whatsoever that the owners of the three premises in question had anything to do with, or were even aware of what was taking place in the houses. As the Court stated in *Boss*:

> "Mere ownership of the building in which the club was operated by a lessee cannot be held to be ownership of the gambling business, without further proof of actual financial connections and participation in the gambling business . . ." *United States v. Boss*, 671 F.2d 396, 402 (10th Cir. 1982).

The record is completely void of such evidence in this case. Since only four persons at most can be counted towards the five person requirement of §1955, Petitioner's conviction under the statute should have been reversed.

In summary, Petitioner respectfully submits that there is a split in the circuits as to the scope of §1955 (b)(1)(ii) and the proper test to apply in determining whether the five person requirement has been met. Petitioner contends that the confusion on this issue can only be resolved by this Court, and that the reasoning and ruling of *United States v. Boss* is the view that should prevail. Application of the necessary function test to the present case demonstrates that the District Court and the Court of Appeals have failed to apply the correct standard and Petitioner's conviction should therefore be reversed.

II. THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AND IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

In Count One, paragraph 2 of the Indictment, Petitioner was charged under 18 U.S.C. §1962(c) with being a member of an enterprise affecting interstate commerce whose purpose was to corrupt the Philadelphia Police Department by offering bribes to police officers. This enterprise was said to be conducted through a pattern of racketeering activity, namely, the bribes themselves. Petitioner submits that the Government failed to prove the existence of an enterprise separate from the acts of racketeering, and that by affirming Petitioner's conviction, the Third Circuit Court of Appeals is in conflict with the law as expressed by this Court in *United States v. Turkette*, 452 U.S. 576 (1981).

United States v. Turkette, supra, this Court ruled that while a RICO enterprise could be either legal or illegal, the Government had to prove its existence as an entity separate and independent from the acts of racketeering:

> "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* at 583.

The enterprise must be proved by evidence of an *ongoing organization* whose members function as a *continuing unit*. Racketeering, on the other hand, is proved by evidence of the predicate offenses committed by the members of the enterprise. *United States v. Turkette, supra*, at 583. While the evidence used to prove one of these elements may "in particular cases" also help to

prove the other, the fact remains that ". . . proof of one does not necessarily establish the other." *Id.*

In the instant case, the Government failed to show the existence of an enterprise as defined in *Turkette*. There was no showing of an ongoing unit structured for the purpose of bribing police aside from the bribery itself. The only evidence of any sort of independent organization related to the ziginette card game. If the Government had chosen to define the ziginette card game as the RICO enterprise, and the acts of bribery as the means by which that enterprise was conducted, then its proof at trial might have conformed to such a charge. But that is not what the Government did. Instead, it charged that the enterprise was an association in fact formed for the purpose of bribing police. In relation to this "enterprise", there was no evidence other than the payment of bribes. Since "the enterprise is not the pattern of racketeering," *United States v. Turkette, supra*, at 2528, it is clear that the Government failed to present sufficient evidence of the enterprise charged in the Indictment.

The Government further charged in Count One, paragraph 3 of the Indictment, that it was "part of the affairs of the enterprise" that the defendants would operate a ziginette card game. Thus, the ziginette card game functioned as a means through which the enterprise was conducted. The evidence, at best, showed only that the enterprise (the association to bribe police) facilitated the ziginette card game. In other words, the order of proof was backwards.

In *United States v. Nerone*, 563 F.2d 836 (7th Cir.) *cert. denied*, 435 U.S. 951 (1978), the Government made a similar error. The Indictment there charged that the enterprise, a mobile home park named Maple Manor, was conducted by the defendants through a casino operation. However, the Government tried its case on the theory that Maple Manor, the enterprise, facilitated the casino operation. The court overturned the

RICO conviction, stated that the word "through" as cited in 18 U.S.C. §1962(c) meant that the enterprise must be conducted by means of the racketeering activities, and not the reverse. *United States v. Nerone, supra,* at 851.

In the instant case, the Government proved, at most, that the gambling enterprise was facilitated by bribery. As in *Nerone,* however, the Indictment did not define the gambling operation as the RICO enterprise, and the Government's proof was backwards. Furthermore, the Government failed to prove that the *bribery* enterprise was facilitated by the ziginette card game or by the bribes themselves. The Government failed to prove this, because it is impossible to prove.

In summary, Petitioner submits that there is no escaping the fact that the enterprise and the racketeering activities in this case are one and the same. The Government's proof did not conform to the enterprise charged and Petitioner's conviction must be reversed under *Turkette* and *Nerone.*

III. THE COURT OF APPEALS BELOW HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

In order to satisfy the requirements of 18 U.S.C. §1962(c), the Government must prove both the existence of an enterprise and its involvement in interstate commerce.

The Government's evidence regarding interstate commerce in this case consisted of the following items:

1. The cards used in the ziginette card game were manufactured out-of-state. (T4-214-216).

2. A man driving a car with New Jersey plates was seen entering 1214 South Seventh Street. (T4-151).

3. Petitioner once drove his wife's car, which had a New Jersey license plate, to a meeting with undercover police officers. (T3-37-38).

4. The Philadelphia Police Department exchanged information with out-of-state law enforcement agencies. (T1-37).

5. Out-of-state telephone calls were made to and from the premises where the card games took place. (T4-210-213).

The law is clear that it is the *enterprise*, and not the racketeering activities, which must affect interstate commerce. *United States v. Nerone*, 563 F.2d 836 (7th Cir.) *cert. denied*, 435 U.S. 951 1978). Furthermore, the enterprise required to affect interstate commerce must be the enterprise *charged*.

Petitioner submits that the Government failed to prove that the enterprise charged was engaged in interstate commerce and that his conviction was therefore in conflict with *United States v. Nerone, supra*.

As emphasized in the previous argument, the enterprise charged in the Indictment is an association in fact to bribe police officers. It is not the ziginette card game. However, the evidence presented by the Government to establish interstate commerce relates only to the ziginette game and is therefore irrelevant to the enterprise charged. Obviously, the origin of the playing cards, the appearance of a man with New Jersey license plates on the premises where the card game is being played and telephone calls made to and from that premises can relate to nothing other than a possible gambling enterprise.

A review of the conversation between Petitioner and Officer Woodman on the day Petitioner drove his wife's car to the meeting likewise reveals that the entire incident was connected directly to the card game since the purpose of the meeting (and indeed of all the meetings)

was to establish protection for the ziginette card game. (Govt. Exhibit 43R-1), T3-37-38). These contacts were part and parcel of the affairs of a gambling operation, which the Government chose not to elect to charge as the RICO enterprise.

The exchange of information between the Philadelphia Police Department and out-of-state agencies is the only factor which has any possible relation to the enterprise charged. Petitioner submits that this evidence is insufficient to satisfy the "minimal" burden of the Government to prove interstate commerce.

In this case, it was the *Police Department* which engaged in interstate commerce by exchanging information with out-of-state agencies. However, for purposes of the RICO statute, it is the *enterprise* charged in the Indictment which must engage in interstate commerce. *United States v. Nerone*, 563 F.2d 836 (7th Cir.), *cert. denied*, 435 U.S. 951 (1978); *United States v. Groff*, 643 F.2d 396 (6th Cir. 1981). The Police Department is not the enterprise. In the instant case, there is no evidence that the enterprise charged engaged in interstate commerce. There is only evidence of the Police Department's interstate connections, and this is insufficient.

In *United States v. Rone*, 598 F.2d 564 (9th Cir.), *cert. denied*, 445 U.S. 946 (1980), the Ninth Circuit interpreted the interstate commerce element of RICO far more broadly. The enterprise was an association in fact to commit extortion through acts of bombing and murder. The court held that interstate commerce could be established merely by showing that the murder victims' business purchased steel manufactured in another state.

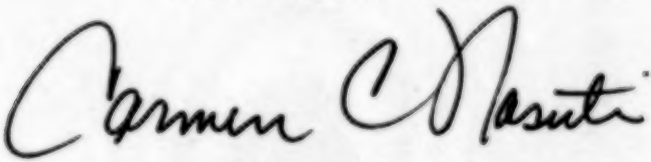
Petitioner respectfully submits that the *Rone* theory is too broad, even for purposes of RICO. The purpose of RICO is to prevent organized crime from infiltrating our economy. In this regard, it is the enterprises's contacts with other states with which the statute is concerned. To carry this concept so far as to say that the *victim's* con-

tacts establish the link of the enterprise to interstate commerce is to attenuate and dilute the requirement to a parody. Even if Congress intended a broad interpretation of RICO, it could not have meant the interstate commerce requirement to be no more than a rubber stamp. Such an interpretation would permit countless minor, borderline cases to be elevated to a federal stature. While Petitioner acknowledges that Congress did not intend to exclude less serious cases from RICO, it must have had some limit in mind. Petitioner's conviction should therefore be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,



CARMEN C. NASUTI, Esquire
Attorney for Petitioner
ANTHONY CHARLES ROSSANO

ates of America vs. United States District Court for the Eastern District of Penna.

ANTHONY CHARLES ROSSANO, a/k/a Chas

DOCKET NO. Crim. 80-00213-2

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date Louis R. Pichini

MONTH	DAY	YEAR
June	17th.	1981

( ) WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

(X) WITH COUNSEL Carmen C. Nasuti
(Name of counsel)

( ) GUILTY, and the court being satisfied that there is a factual basis for the plea, ( ) NOLO CONTENDERE, (X) NOT GUILTY

There being a finding/verdict of ( ) NOT GUILTY. Defendant is discharged (X) GUILTY.

Defendant has been convicted as charged of the offense(s) of Racketeer Influenced and Corrupt Organizations; Prohibition of Illegal Gambling Businesses; Conspiracy; Aiding and Abetting, in violation of Title 18, U. S. C. Secs. 1962(c), 1955, 371, 2

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on Count 1, and pay a fine in the sum of $10,000.00 to the United States of America. The defendant shall stand committed until the fine is paid or until the defendant is otherwise discharged by law.

Count 2 - Imposition of prison sentence is suspended, and the defendant is placed on probation for a period of ONE (1) MONTH to run concurrent with the prison sentence imposed on Count 1.

Count 3 - The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS to run concurrently with the prison sentence imposed on Count 1.

(The defendant is continued on the same bail pending appeal - execution of the sentence is stayed pending appeal)

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

District Judge / Magistrate

JOSEPH S. LORD, III

Date JUNE 17th, 1981

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2115

UNITED STATES OF AMERICA

v.

ANTHONY CHARLES ROSSANO, a/k/a Chas,

Appellant

(D.C. Criminal No. 80-00213-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
May 13, 1982
Before: GIBBONS and HUNTER, *Circuit Judges*
and GERRY, *District Judge**

CARMEN C. NASUTI, ESQ.
NASUTI and MILLER
1325 Spruce Street
Philadelphia, PA 19107

Attorneys for Appellant

---

*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

PETER F. VAIRA, JR.
United States Attorney
Eastern District of Pennsylvania

LOUIS R. PICHINI
Special Attorney
Department of Justice
Philadelphia, PA 19106

KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530

Attorneys for Appellee

JUDGMENT ORDER

Anthony Charles Rossano appeals from a judgment of sentence following his conviction of violating 18 U.S.C. §§1962(c), 1955 and 371. He contends:

(1) that the court erred in refusing to strike for cause venireman David Anthony;

(2) that the government failed to prove the existence of the enterprise or a pattern of racketeering;

(3) that the government failed to prove an effect on interstate commerce from the activities of the enterprise charged in the indictment;

(4) that the government failed to prove a predicate state offense to sustain a §1955 conviction in that 18 Pa. Cons. Stat. Ann. §5513 (Purdon 1973), does not give fair warning that it proscribes maintaining a gambling house for card playing;

(5) that the government failed to prove

(A) participation of five or more persons conducting an illegal gambling business,

(B) substantially continuous operation of the gambling operation for 30 days or a gross in a single day of over $2000, as required by §1955;

(6) that if the proof was insufficient under §1955 it is also insufficient to establish a conspiracy under 18 U.S.C. §371 to violate that section.

We find no merit in these contentions.

It is O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed.

BY THE COURT,

Circuit Judge

Attest:

Sally Mrvos, *Clerk*

Dated: May 14, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2115

UNITED STATES OF AMERICA

v.

ANTHONY CHARLES ROSSANO, a/k/a Chas,
Appellant

(D.C. Criminal No. 80-00213-02)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____

Judge

Dated: June 15, 1982

Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS
CLERK

No. 82-124

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANTHONY CHARLES ROSSANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the evidence showed that at least five persons "conducted" an illegal gambling business, within the meaning of 18 U.S.C. 1955.

2. Whether the evidence proved the existence of an "enterprise" as required by 18 U.S.C. 1962(c).

3. Whether the evidence proved that the racketeering enterprise engaged in or affected interstate commerce.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-124

ANTHONY CHARLES ROSSANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A2-A4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1982. A petition for rehearing was denied on June 15, 1982. The petition for a writ of certiorari was filed on July 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c) (count one), one count of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (count two), and one count of conspiracy to conduct an illegal gambling business, in violation of 18 U.S.C. 371 (count three). He was sentenced to two concurrent terms of two years' imprisonment, a concurrent term of one month's probation, and a $10,000 fine. The court of appeals affirmed by judgment order (Pet. App. A2-A4).

The evidence at trial established that from March 1979 to June 1980 petitioner and others regularly paid bribes to Jack Woodman and James Stinsman, who posed as corrupt policemen as part of an undercover investigation conducted by the Philadelphia Police Department and the Federal Bureau of Investigation. The bribes were paid in return for protection of an illegal gambling operation run by co-defendant Frank Narducci. Narducci operated a ziginette card game, which was played on a regular basis from Saturday until Sunday morning and again on Monday until early Tuesday. Ziginette is a card game played with the 8's, 9's, and 10's removed from the deck. The game rotated among several locations in the vicinity of 7th and Federal Streets in Philadelphia, including 1153 8th Street, 1214 7th Street, and 803 Latona Street.

Officers Woodman and Stinsman were investigating illegal gambling in South Philadelphia in the summer of 1978 when they were told that Narducci wanted to do business with them and that they could

make a lot of money by cooperating with him (1 Tr. 36, 40-41, 46-47). Woodman reported this to his commanding officer and to the FBI, and a joint investigation was begun (1 Tr. 56). Woodman agreed to wear a body recorder at any meetings and to record any telephone calls made in connection with the investigation (*ibid.*).

On November 2, 1978, Narducci met with Woodman and said that he wanted the police to "lay off" (Gov't Exh. 6R-1).

During patrol on Monday evening November 6, Woodman and Stinsman saw a large group of men leaving an alley on Federal Street and subsequently observed Narducci and two other men leaving a house at 1153 8th Street (2 Tr. 29; 4 Tr. 60). Within a few minutes, about 10 more men, including petitioner, left the rear of that house. The officers followed two of the men to 1214 7th Street, where they saw about 20 men inside and outside the house. Petitioner was seen standing at the door (2 Tr. 30; 4 Tr. 60-61). Officer Woodman saw John Grande standing in front of the house and told him to tell "Chickie" (Narducci) to "get that game out of Marie's house" (2 Tr. 31). Narducci complained that Woodman was harassing him, but Woodman replied that he was just doing his job and repeated his earlier warning (2 Tr. 31-34). As the officers were leaving, Grande held out some money and approached Stinsman, saying, "Here, let me take care of you." Stinsman responded, "Don't embarrass me," and the officers left (2 Tr. 34; 4 Tr. 62-63). The officers reported this incident to the FBI (2 Tr. 35).

On March 5, 1979, Woodman and Stinsman were again working in the same area when they saw Narducci and Grande leave a building at 803 Latona

Street. Grande walked up to the car window and said, "You aren't going to bother the game, are you?" Stinsman replied, "What game?" Grande then winked (2 Tr. 37-38; 4 Tr. 63-64). The officers watched the entrance of 803 Latona for the next hour and a half and observed about ten men, including petitioner, Narducci, Grande, and Al Mazzucca, enter and later leave the premises.

On the night of Monday, March 26, 1979, Woodman and Stinsman conducted a surveillance of 803 Latona and saw about 20 men enter in groups of two or three. The officers also observed Mazzucca leave and return about three times. On each occasion he came back with two or three men, knocked on the door, and then entered (2 Tr. 40; 4 Tr. 65). At about 12:45 a.m. the two officers, who were dressed in plain clothes, knocked on the door. Mazzucca opened the door and let them in. Inside they saw about 40 people gathered around a dining room table covered with cards and money. Mazzucca then looked more closely at the two police officers and shouted "Fuzz!" A commotion began, with people grabbing cards and money (2 Tr. 41; 4 Tr. 65-66).

Petitioner approached Woodman and asked to speak with him outside. Petitioner then suggested that the officers accept $50 from each person playing. When Woodman objected that "everyone inside would know his business," petitioner offered to pay Woodman $500 the following day in exchange for allowing the game to continue. Petitioner said, "Just you, me, and the 'Man' will know about it" (2 Tr. 41-43; 4 Tr. 66-68).

The next day Woodman and Stinsman arrived at petitioner's store and saw petitioner talking with Narducci. After Narducci left, petitioner approached the officers (2 Tr. 44-45; 4 Tr. 69). In a tape-

recorded conversation, petitioner detailed the arrangement he had proposed the night before. In return for monthly payments of $400 to be paid on the 27th of each month, the officers were to allow the ziginette game to go on undisturbed. Petitioner made it clear that he was representing Narducci and that all contact with the latter would be handled through him. Petitioner also said that if the officers had any information useful to Narducci, petitioner would try to get them some additional money (Gov't Exh. 7R-1). Petitioner gave them $500, and the officers agreed to the continuing arrangement (*ibid.*).

Each month thereafter until February 1980, Woodman and Stinsman met with petitioner at the store or at his home and received $400. On each occasion the officers recorded the conversation and turned the money over to the FBI (2 Tr. 46, 57, 79, 83, 89, 93, 99; 3 Tr. 11, 13, 23, 25, 30, 40; Gov't Exhs. 14-20, 22, 23, 25, 26, 28, 30).

On Saturday, July 14, 1979, the FBI raided 803 Latona Street (2 Tr. 86; 4 Tr. 131-132). Inside, they found about 20 men, several of whom were stuffing money into their pockets as the agents entered (4 Tr. 132-133). One agent stopped petitioner as he handed a large roll of money to his son (4 Tr. 134). The agents also discovered one man in the kitchen cooking hot dogs, and they found cases of napkins, paper plates, and plastic coffee cups (4 Tr. 133-135). They seized a dealing shoe and several other decks of cards that lacked 8's, 9's, and 10's (4 Tr. 135; Gov't Exhs. 1, 2A-2F). The agents also seized $150 from the dining room table, over $2,000 from Bernard Malseed, $1400 from Joseph Pisano, and nearly $8,000 from petitioner (4 Tr. 136-137; Gov't Exhs. 35-38).

The next week, Woodman called petitioner and told him that he had tried to warn him about the raid (Gov't Exh. 21R-1). That same night they met, and petitioner gave Woodman and Stinsman $100 (2 Tr. 88-89; Gov't Exh. 22R-1 at 20). Thereafter, Woodman and Stinsman periodically revealed selected pieces of FBI investigative information to petitioner or Narducci and informed them that the FBI was focusing more and more closely on their gambling activities (2 Tr. 92-93; 3 Tr. 7-9, 12, 18, 31, 39-40; Gov't Exhs. 29R-1, 33R-1 at 3-5, 34R-1 at 19-21; 40R-1, 39, 40, 43). On several occasions, the officers were paid an extra $100 for the information supplied (Gov't Exhs. 21, 23, 24, 27, 29).

In late February 1980, petitioner told Woodman that it had become too dangerous for them to be seen together and that someone else would have to deliver the monthly payments (Gov't Exh. 44R-1). On Monday evening March 3, at petitioner's direction, Woodman and Stinsman drove to a parking lot on Sixth Street (Gov't Exh. 47R-1; 3 Tr. 45). A few minutes later, Narducci drove by slowly and motioned to them. The officers followed and observed Narducci and Louis Teti sitting in Narducci's car. Teti threw a bag of money totalling $400 into the open window of the officers' car and walked toward 1214 7th Street (3 Tr. 45-49). Payments were made in a similar manner on Monday March 31 and Monday April 28. On March 31 Teti threw the money into the car (3 Tr. 52-57; Gov't Exhs. 49R-1, 50R-1). On April 28 Americo Buonacoure and Joseph Dupoldt were seen with Narducci shortly before the payment was made, and Dupoldt threw the money into the car (3 Tr. 57-59).

On May 27, Woodman and Stinsman waited in the parking lot for their payment as they had the previous month, but this time no one came (3 Tr. 60). On Monday, June 23, Woodman called Narducci at 1214 7th Street and reminded him that they had not received the previous month's payment (3 Tr. 60-62; Gov't Exh. 51R-1). Narducci instructed him to go to the appointed place that night, and this time Buonacoure delivered the $400 payment. Afterwards, the officers saw Buonacoure enter 1214 7th Street (3 Tr. 62-67; Gov't Exhs. 51R-1, 52R-1, 68A-68I). Later that same night, the FBI raided 1214 7th Street and executed a search warrant (4 Tr. 161). As the agents entered, they saw several men, including Narducci and Dupoldt, leave through the back door and climb over a wall in the yard (4 Tr. 162-163). As before, the agents seized numerous cards, including discarded 8's, 9's, and 10's, as well as a dealing shoe (4 Tr. 164-167). Photographs taken of the interior of the house showed a Coke machine, a cigarette machine, a case of plastic coffee cups, and a large amount of food (4 Tr. 170-174).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. This Court has stated that 18 U.S.C. 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor" (*Sanabria* v. *United States*, 437 U.S. 54, 70-71 n.26 (1978). Petitioner contends (Pet. 6-12) that despite this guidance there is a conflict among the circuits concerning the proper test for determining

whether a person has "conducted" a gambling business within the meaning of 18 U.S.C. 1955. While the Tenth Circuit has concluded that a person must perform "a necessary function for the illegal gambling business" (*United States* v. *Boss*, 671 F.2d 396, 400 (10th Cir. 1982)), the Fifth, Seventh, and Eighth Circuits have employed a "necessary or helpful" test. *United States* v. *Colacurcio*, 659 F.2d 684, 688 (5th Cir. 1981), cert. denied, No. 81-1435 (Mar. 8, 1982); *United States* v. *Tucker*, 638 F.2d 1292, 1296 (5th Cir.), cert. denied, No. 80-2108 (Oct. 5, 1981); *United States* v. *Bennett*, 563 F.2d 879, 883 (8th Cir.), cert. denied, 434 U.S. 924 (1977); *United States* v. *Greco*, 619 F.2d 635, 638 (7th Cir. 1980). Petitioner claims (Pet. 11-12) that under the *Boss* test the evidence failed to show that five or more persons conducted the gambling business in this case. Petitioner's argument lacks merit.

First, it is by no means clear that the decisions of the circuits actually conflict. While the *Boss* court expressed disagreement with the "necessary or helpful" test, it distinguished the cases decided under that standard and approved the results reached in those decisions (671 F.2d at 400 & n.5).

More important, it is apparent that the evidence in this case proved the participation of five or more persons under either test. Narducci and petitioner obviously conducted the gambling business, as petitioner concedes (Pet. 11). He also concedes that Angelo Angelucci and Alfred Mazzucca, two doormen, may be counted as persons who conducted the business (Pet. 11).[1] But it was not necessary, as petitioner claims (Pet. 12), for the government to

---

[1] Angelucci also delivered a $100 payment for Narducci to the police officers (8 Tr. 31-32; Gov't Exhs. 19, 40R-1).

rely on cooks, errand boys, the record owners of the properties involved, or other peripheral participants to satisfy the five-person requirement. In addition to the four persons noted above, there was ample evidence of the participation of several others who performed important functions connected with the gambling operation.

For example, Bernard Malseed was seen entering 803 Latona Street on March 25, 1979 (4 Tr. 64-65). He was searched during the FBI raid on the card game on July 14, 1979, and $2,281 was seized from him (4 Tr. 137). And on March 22, 1980, when two FBI agents asked to speak with someone in charge at 1214 South 7th Street, Malseed came to the door and led them inside (4 Tr. 156-159). Americo Buonacoure delivered the final bribery payment on June 23, 1980, and was seen entering the house at 1214 South 7th shortly before it was raided. He was also seen with Narducci going to or coming from the game on several occasions (3 Tr. 6, 14, 18, 58-59, 67), and Narducci himself emphasized Buonacoure's importance to him in a conversation with Officer Woodman (Gov't Exh. 29R-1 at 6; 3 Tr. 9). From this evidence, it was perfectly reasonable for the jury to conclude that both Malseed and Buonacoure were more than simple bettors, *i.e.*, that Malseed was a "deputy" who took charge in Narducci's absence and that Buonacoure was a messenger for Narducci who was closely associated with him and knew the purpose of the money he delivered.

Similarly, Joseph Dupoldt delivered one of the bribery payments on March 28, 1980 (3 Tr. 57-59); he was present at 1214 South 7th Street on March 22, 1980, and spoke with FBI agents (4 Tr. 157); and he was seen running away from the game with Nar-

ducci when the FBI raided 1214 7th Street (4 Tr. 162-163). Dupoldt was clearly more than just a trash collector, as petitioner suggests (Pet. 12).

Louis Teti delivered two of the bribery payments (3 Tr. 45-49, 52-57). Moreover, in a brief conversation with Woodman at the time of the March 31 payment, he said he would be the "regular" deliveryman and that the 27th of the month would be the date of the payments (Gov't Exh. 50R-1).

John Grande was still another person shown to have played a role in the conduct of the game. He made the first offer of money to the police when Woodman told Narducci to close down the game (2 Tr. 34; 4 Tr. 62-63) and he relayed messages between the officers and Narducci (2 Tr. 32, 37-38; 4 Tr. 63-64).

From all this evidence, there can be no doubt that at least five persons "conducted" the ziginette game, under either the "necessary" or the "necessary-or-helpful" standard. Thus, even assuming that there is a conflict among the circuits on this issue, this case presents no occasion for resolution of the conflict.

2. Petitioner claims (Pet. 13-15) that the government failed to prove the existence of an "enterprise" within the meaning of 18 U.S.C. 1962(c). He contends (Pet. 13-15) that the decision below conflicts with *United States* v. *Turkette*, 452 U.S. 576 (1981), because the proof allegedly did not establish the existence of "an entity separate and apart from the pattern of activity in which it engage[d]" (*id.* at 583). Because this contention involves merely the application of the legal principles of *Turkette* to the facts of the present case the court of appeals rendered no published opinion. In addition, petitioner's sentence on the RICO count was concurrent. Accord-

ingly, the contention does not merit review by this Court. The record demonstrates, moreover, that there was ample proof of the enterprise element.

In *Turkette*, this Court explained (452 U.S. at 583):

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.

Here, the enterprise alleged in the indictment was "a group of individuals associated in fact for the purpose of corruptly influencing and infiltrating the Philadelphia Police Department by offering, conferring and delivering bribes to police officers of the City of Philadelphia" (C.A. App. 5-6). The operation of the ziginette card game was alleged to have been "part of the affairs of the enterprise," and it was further alleged that the bribery was for the purpose of protecting those involved in the game from arrest (C.A. App. 6).

In its proof, the government showed both that there was "an ongoing organization" that had as one of its objectives that of bribing police officers and that "the various associates function[ed] as a continuing unit."

It may be that the indictment characterized the enterprise somewhat too narrowly by describing it only as an organization whose purpose was bribery instead of as a group that operated an illegal gambling business *and* conducted a well-organized bribery scheme in order to assure the continuation of the gambling. But it was clear from the RICO count as a whole and from the government's proof that the bribery and gambling were inextricably connected as dual objectives of the group. There was ample proof of an ongoing organization with a definite structure, and the organization not only engaged in bribery—the acts constituting the pattern of racketeering activity—but operated the illegal card game as well.

Frank Narducci stood at the core of the enterprise. He was the decisionmaker, the source of the bribery money, and the operator of the ziginette game (Gov't Exhs. 7R-1 at 2-3, 6-8, 10, 18, 12R-1 at 3, 22R-1 at 20, 29R-1 at 3, 31R-1 at 11, 35R-1 at 6, 45R-1 at 5, 47R-1 at 3-6). Petitioner acted as Narducci's principal intermediary in the bribery scheme. He explained the bribery agreement to the police officers (Gov't Exh. 7R-1 at 2-6, 10-14, 18) and relayed messages between Narducci and the officers (Gov't Exhs. 7R-1 at 7, 9, 14, 8R-2 at 5, 9R-1 at 2, 11R-1 at 3). In addition, petitioner met monthly with the police officers and personally delivered the bribe payments (Gov't Exhs. 14-20, 22, 23, 25, 26, 28, 30; 2 Tr. 46, 57, 79, 83, 89, 93, 99; 3 Tr. 11, 13, 23, 25, 30, 40). When petitioner was unavailable, other individuals associated with the ziginette game acted as intermediaries. Louis Teti, Joseph Dupoldt, and Americo Buonacoure delivered some of the later bribery payments (3 Tr. 48-49, 53-54, 58, 62-63), and they were also seen with Narducci on other occasions going to

or coming from the ziginette game (3 Tr. 6, 14, 18, 48-49, 58-59, 67; 4 Tr. 157, 161, 163). John Grande acted as a middleman and made the bribery overture to Officer Stinsman on November 6, 1978, in the presence of Narducci (2 Tr. 31-34). Grande also spoke with Stinsman on March 5, 1979, about interfering with the game (2 Tr. 38).

From all this evidence, particularly when it is viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), it is apparent that the prosecution amply proved not only that bribery payments were made, but that the bribery scheme was carried out by a structured organization with several criminal objectives.[2]

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[2] Petitioner also claims (Pet. 14-15) that the prosecution failed to prove that he participated in the affairs of the enterprise "through" a pattern of racketeering, as required by 18 U.S.C. 1962(c). Relying on *United States* v. *Nerone*, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), he argues that the government proved only that the enterprise—the bribery association—facilitated the gambling operation, and not that the enterprise was facilitated by the card game or bribes. But the facts in *Nerone* bear no relation to those of the instant case.

In *Nerone*, the court found that there was "a total want of proof of the connection between the racketeering activities [gambling offenses] and the affairs of the [enterprise—a mobile home corporation]" (563 F.2d at 852). Here, on the other hand, the connection between the enterprise—a group associated in fact for the purpose of bribery—and the pattern of racketeering activity—acts of bribery—could hardly be clearer. It is apparent that petitioner participated in the enterprise's affairs, which naturally included bribery, through a pattern of racketeering activity, *i.e.*, bribery. Petitioner's claim (Pet. 15; emphasis in original) that the government was obligated "to prove that the *bribery* enterprise was facilitated by * * * the bribes" simply makes no sense. The term

3. Finally, petitioner contends (Pet. 15-18) that the government failed to prove the requisite connection between the enterprise and interstate commerce. He claims that the only evidence introduced to establish an involvement in interstate commerce relates to the ziginette card game and not to the enterprise charged in the indictment.

This argument is without merit. It ignores not only the plain language of the statute, but the case law as well. The statute requires that the enterprise must be one that is "engaged in, or the activities of which affect, interstate or foreign commerce * * *" (18 U.S.C. 1962(c)). The courts agree that this broad language indicates that only a minimal impact on interstate commerce suffices. *United States* v. *Barton*, 647 F.2d 224, 233 (2d Cir.), cert. denied,

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"facilitate" does not appear in the statute or in *Nerone*, and it is plainly not a synonym of the statutory term "through."

If petitioner is suggesting that the pattern of racketeering activity must benefit or advance the purpose of the enterprise, the courts are in agreement that such an interpretation of the word "through" was not intended by Congress. *United States* v. *Webster*, 669 F.2d 185 (4th Cir. 1982); *United States* v. *Welch*, 656 F.2d 1039, 1060-1062 (5th Cir. 1981); *United States* v. *Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); *United States* v. *Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978). Such an interpretation would exclude those cases in which the enterprise was either a governmental entity or a legitimate business or organization whose affairs were not benefited by the racketeering activity. There is nothing to suggest that Congress meant to exclude such situations from the Act's coverage. *United States* v. *Welch*, *supra*, 656 F.2d at 1061-1062. Moreover, even if that interpretation were correct, here the bribery payments furthered the activities of the association, such as the card game. In addition, it seems clear that each act of bribery helped to perpetuate the bribery association.

No. 80-6926 (Oct. 5, 1981); *United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Nerone*, *supra*, 563 F.2d at 850-851, 854. Moreover, the term "affect interstate or foreign commerce" appears in numerous federal statutes and has always been interpreted to reach to the constitutional limits. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146 (1971); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Stirone* v. *United States*, 361 U.S. 212 (1960). Thus, in RICO cases, it has been held that the requisite effect on interstate commerce was proved where a defendant who resided in New York purchased a house in New Jersey in connection with the illegal enterprise. *United States* v. *Mannino*, 635 F.2d 110, 118 (2d Cir. 1980). Where the enterprise was a county attorney's office, its interstate telephone calls, purchases of supplies and materials from outside the state, and investigations involving citizens of other states were held sufficient. *United States* v. *Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980). And in a case very similar to this one (*United States* v. *Allen*, 656 F.2d 964 (4th Cir. 1981)), the court held that the supplies used in the defendant's bookmaking operations, which originated outside the state, provided a sufficient interstate commerce nexus.

Petitioner apparently concedes (Pet. 16) that the gambling operation's involvement in interstate commerce was proved by evidence concerning the out-of-state origin of the playing cards and evidence concerning a bettor who arrived in an out-of-state car. But he contends (Pet. 16) that there was no evidence that the enterprise—the group associated to engage in bribery—affected interstate commerce. However, the statutory language demonstrates that proof of the ziginette game's contact with interstate commerce was enough. The statute refers to "any enterprise

engaged in, *or the activities of which affect*, interstate or foreign commerce * * *." 18 U.S.C. 1962(c) (emphasis supplied). Thus, this element has been satisfied by evidence that a car blown up in connection with an enterprise was insured by an interstate insurance carrier (*United States* v. *Barton*, *supra*, 647 F.2d at 234), by evidence that a company operated by a murder victim bought materials from outside the state (*United States* v. *Rone*, *supra*, 598 F.2d at 573), and by evidence that out-of-state insurance companies paid claims resulting from arson (*United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117 (1980); see also *United States* v. *Martino*, 648 F.2d 367 (5th Cir. 1981), cert. denied, No. 81-907 (Apr. 26, 1982)). Here, as already noted, the ziginette game, which clearly affected interstate commerce, was described in the indictment as part of the affairs of the enterprise.

In addition, the government established the needed effect on interstate commerce with evidence concerning the police department's exchange of information with out-of-state agencies (1 Tr. 37-39).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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